UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

New York State Electric & Gas Corporation) Docket No. EL95-28-000

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued April 12, 1995)

I. Introduction

On February 14, 1995, New York State Electric & Gas Corporation (NYSEG) filed a Petition fcr Declaratory Order, Complaint, and Request for Modification of Rates in Power Purchase Agreements Imposed Pursuant to the Public Utility Regulatory Policies Act of 1978 (Petition). NYSEG asserts that the rates it pays for power produced by two qualifying facilities (QFs) under contracts with Lockport Energy Associates, L.P. (Lockport) and Saranac Power Partners, L.P. (Saranac) exceed NYSEG's avoided costs and, therefore, violate Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).[1]

As described further below, we: (a) find that the rates required under NYSEG's contracts with Lockport and

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1 16 U.S.C.A. § 824a-3 (West 1985 & Supp. 1994).

Saranac are consistent with the provisions of PURPA, and our implementing regulations; and (b) deny the various forms of relief requested by NYSEG.

II. Background

A. Statutory and Regulatory Background.

Section 210(a) of PURPA requires the Commission to prescribe rules to encourage cogeneration and small power production --including rules that require electric utilities to purchase electric energy generated by qualifying cogeneration and small power production facilities.[2] Section 210(b) also requires the Commission to issue rules that insure that the rates an electric utility pays a QF are just, reasonable, in the public interest and not discriminatory.[3] However, the Commission cannot prescribe a rule that provides for "a rate which exceeds the incremental cost to the electric utility of alternative electric energy."[4]

The Commission's regulations, in turn, require electric utilities to purchase the capacity and energy made available

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2 16 U.S.C. § 824a-3(a) (1988). Qualifying cogeneration and small power production facilities are those cogeneration and small power production facilities that meet certain specified criteria. See 16 U.S.C.A. §§ 796(17)-(18) (West 1985 & Supp. 1994); 18 C.F.R. Part 292 (1994).

3 16 U.S.C. § 824a-3(b) (1988).

4 Id. Section 210(d) of PURPA defines such incremental cost as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d) (1988).

by a QF.[5] They also provide that the rates an electric utility pays a QF shall be just, reasonable, in the public interest and not discriminatory.[6] They further provide that none of the regulations "requires any electric utility to pay more than the avoided costs for purchases"[7] and that a rate for purchases from a QF, construction of which commenced on or after November 9, 1978, will be considered to be just, reasonable, in the public interest and not discriminatory "if the rate equals . . . avoided costs."[8] The regulations stipulate that rates may be based on a utility's avoided costs as calculated at the time the obligation is incurred,[9] and such 'rates will meet the statutory and regulatory standards even if they "differ from avoided costs at the time of delivery."[10]

Section 210(f) of PURPA requires each State regulatory authority to implement the Commission's rules,[11] and the Commission's regulations, in turn, similarly required

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5 18 C.F.R. § 292.303 (a) (1994).

6 18 C.F.R. § 292.304(a) (1) (1994).

7 18 C.F.R. § 292.304(a) (2) (1994). The Commission's regulations define avoided costs as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the [QF] . . ., such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b) (6) (1994).

8 18 C.F.R.§ 292.304(b) (2) (1994).

9 18 C.F.R. § 292.304(d) (2) (1994).

10 18 C.F.R. § 292.304(b) (5) (1994).

11 16 U.S.C. § 824a-3(f) (1988).

that each State regulatory authority implement the rules.[12] Section 210(h) of PURPA grants authority and prescribes procedures for Commission enforcement of the requirements of Section 210(f).[13]

For most facilities that are QFs, Section 210(e) of PURPA and the Commission's regulations further provide for exemptions from regulation under the Federal Power Act (FPA), the Public Utility Holding Company Act, and also under state law -- including rate regulation under the FPA and state law.[14] Rates for sales at wholesale by QFs are governed, as noted above, by PURPA.

B. Factual Background

Lockport owns and operates a 1994 MW cogeneration facility in Lockport, New York.[15] Lockport has a power purchase agreement with NYSEG, executed on March 26, 1990, pursuant to which NYSEG purchases the net electric output of the facility (less any power sold to

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12 18 C.F.R. § 292.401(a) (1992). Or May 1, 1992, the Commission eliminated this provision of its regulations as obsolete. The Commission explained that its QF rules took effect in 1980, and that State regulatory authorities and nonregulated electric utilities were required to implement those rules within one year or by the end of 1981. See Eliminating Unnecessary Regulation, Order No. 541, 57 Fed. Reg. 21,730 (May 22, 1992), III FERC Stats. & Regs. ¶ 30,943 at 30,495 (1992).

13 16 U.S.C. § 824a-3(h) (1988).

14 16 U.S.C.A. § 824a-3(e) (West 1985 & Supp. 1994); 18 C.F.R.§§ 292.601(c), 292.602(c)(i) (1994).

15 The Commission previously has certified the Lockport facility as a QF. See Empire Energy-Niagara Cogeneration, Inc., 45 FERC ¶ 61,241 (1988).

Lockport's steam host) for a term of fifteen years that commenced upon the facility's commercial operation in October 1992. Saranac owns and operates a 240 MW cogeneration facility in Plattsburgh, New York.[16]

Saranac entered into a power purchase agreement with NYSEG on April 27, 1990, pursuant to which NYSEG purchases the net electric output of the facility for a term of fifteen years that commenced upon the facility's commercial operation in June 1994.

The payment rates under both the Lockport and Saranac agreements are fixed for the terms of the agreements. The rates are based on the estimates of the New York State Public Service Commission'(New York Commission) of NYSEG's long-run avoided costs (LRACs), as calculated by the New York Commission in 1988.

C. NYSEG's Petition

In its Petition, NYSEG complains that the New York Commission required NYSEG to enter into the agreements with Lockport and Saranac despite NYSEG's objections that the agreements did not adequately protect NYSEG's ratepayers against the risk of payments in excess of avoided costs.[17] According to NYSEG, it has retained two independent analysts, each of which have considered new

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16 The Commission, acting pursuant to delegated authority, previously has certified the Saranac facility as a QF. See Saranac Energy Company, Inc., 57 FERC ¶ 62,211 (1991).

17 NYSEG apparently had proposed to the New York Commission that tracking and reconciliation provisions and other security measures be included in the agreements to avoid payments in excess of avoided costs if the LRAC estimates used to formulate the payment rates proved to be inaccurate. Petition at 12.

LRAC projections for NYSEG and now predict that payments under the Lockport and Saranac agreements will exceed NYSEG's avoided costs throughout the terms of those agreements.[18] Relying on these predictions, NYSEG argues that the rates under the agreements are unauthorized under PURPA.

Specifically, NYSEG seeks three forms of relief. First, pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure,[19] NYSEG requests that the Commission issue a declaratory order finding that PURPA and the Commission's regulations prohibit, in the case of NYSEG's mandated power purchase agreements with Lockport and Saranac, purchase rates that: (a) are in excess of NYSEG's avoided cost; and (b) were based on New York Commission estimates of NYSEG's LRACs calculated at the time the agreements were mandated by the New York

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18 The two analysts retained by NYSEG are Energy Management Associates (EMA) and ICF Resources, Incorporated (ICF). EMA compared payments to be made under the agreements to LRAC estimates for NYSEG calculated by the New York Commission in October 1994. ICF used independent assumptions and made its own calculations of NYSEG's avoided costs. For the period from January 1, 1995 to the end of the term of each agreement, the analysts predict that payments under each agreement will exceed NYSEG's avoided costs in the following amounts:

	Lockport Agreement	Saranac Agreement
EMA Prediction:	$784 million	$1.3 billion
ICF Prediction:	$580 million	$912 million

Petition at 13-15.

19 18 C.F.R. § 385.207(a)(2) (1994).

Commission. NYSEG explains that it consistently challenged the purchase rates before the New York Commission as not adequately protecting NYSEG's ratepayers against the risk that the estimates of LRACs would prove to be overstated over the life of the mandated agreements. NYSEG also explains that the aggregate amount of overpayments to Lockport and Saranac in excess of its avoided cost (See supra fn. 18.) became evident only after NYSEG's time to appeal the orders of the New York Commission directing NYSEG to enter into those agreements had elapsed.

Second, pursuant to Rule 206(a) of the Commission's Rules of Practice and Procedure,[20] NYSEG requests that the Commission either take appropriate action itself under Section 210(b) of PURPA [21] or, under Section 210(h) of PURPA,[22] direct the New York Commission to relieve NYSEG of its obligation to make payments in excess of its avoided cost under the Lockport and Saranac agreements. Finally, NYSEG asks the Commission to make whatever revision or waiver of its rules is necessary to grant the requested relief.

In support of its request for relief, NYSEG states its belief that Section 210(b) of PURPA sets a rate ceiling for utility purchases from QFs at the utility's avoided cost of alternative energy. Because NYSEG predicts that the purchase rates in the Lockport and Saranac agreements will exceed this statutory limit, the rates are unlawful according to NYSEG.

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20 18 C.F.R. § 385.206(a) (1994).

21 16 U.S.C. § 824a-3(b) (1988).

22 16 U.S.C. § 824a-3(h) (1988).

NYSEG argues further that the Commission, by rulemaking implementing PURPA, may not except from PURPA's rate ceiling long-term fixed rates that exceed avoided costs over the term of an agreement. Instead, overestimations and underestimations of avoided costs must balance out so that there are no more than "short-term disparities" between estimates of avoided costs in a contract and the utility's actual avoided costs at the time energy is delivered. Moreover, NYSEG believes that the Commission must mandate that power purchase agreements contain protective measure's to ensure this result.

NYSEG asserts that Section 210 of PURPA "invests the Commission with plenary authority to take action insuring that purchase rates for QF energy comply with PURPA's statutory standards."[23] NYSEG believes this authority derives from the Commission's authority under PURPA to set rates for purchases from QFs and to insure State implementation of the Commission's regulations.

NYSEG also relies on the Commission's recent decision in Connecticut Light and Power Company[24] as precedent for granting the relief it requests. Recognizing that the fact pattern in Connecticut was different from that presented here, NYSEG, unlike the utility CL&P, could not have shown any discrepancy between its avoided costs and the contractual purchase rates at the time the New York Commission mandated the agreements with Lockport and Saranac.

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23 Petition at 41.

24 70 FERC ¶ 61,012 (1995) (Connecticut).

Finally, NYSEG makes the public policy arguments that: (a) the QF contracts at issue are not consensual agreements and, therefore, do not warrant the Commission's usual deference to private contracts; and (b) genuine competition would not require a party to purchase against its will power at rates in excess of market values.

Notice of NYSEG's Petition was published in the Federal Register,[25] with protests and motions to intervene originally due on or before March 7, 1995. By notice of the Commission issued on February 23, 1995, the intervention date was extended to March 14, 1995, with responses to interventions due on or before March 24, 1995.

D. Responses of Lockport and Saranac

On March 14, 1995, Lockport and Saranac each filed a motion to intervene and protest in response to NYSEG's Petition. Both Lockport and Saranac believe that the gravamen of NYSEG's Petition is its contention that the Commission's avoided cost regulations under PURPA -- especially the regulation (18 C.F.R. 292.304) that allows avoided cost to be calculated as of the date the obligation is incurred -- are illegal and should be revised and applied retroactively. Arguing that such regulatory changes cannot be accomplished without full notice and comment rulemaking, and that the Commission lacks jurisdiction to grant NYSEG's requested relief, Lockport and Saranac request that the Commission dismiss NYSEG's Petition. More specifically; Lockport and Saranac argue as follows.

Lockport contends that, for a number of reasons, the Commission has no legal authority to grant the relief requested by NYSEG. First, Lockport believes that the

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25 60 Fed. Reg. 9677 (1995).

Commission's enforcement power under Section 210(h) of PURPA is limited to ensuring that State regulatory authorities have implemented the Commission's regulations. Because NYSEG admits in its Petition that the New York Commission has properly implemented such regulations, Lockport asserts that there is no basis for the requested enforcement action. Second, Lockport points out that most QFs are exempted from both state and federal rate regulation under Section 210(e) of PURPA and the Commission's regulations.[26] Therefore, the Commission has no jurisdiction over the rates in Lockport's contract with NYSEG. Finally, Lockport maintains that, as the preamble to the Commission's QF regulations indicates, the Commission considered and rejected at the time its PURPA rules were issued the claim that power purchase rates must change contemporaneously with market circumstances. Lockport contends that NYSEG should have brought its complaint to the Commission at that time; because NYSEG failed to do so, its claim is now time-barred.

Assuming the Commission has the jurisdiction to grant NYSEG"s requested relief, Lockport argues that relief nevertheless should be denied. Lockport argues that NYSEG's allegations of changed market circumstances represent the type of justification the Commission has consistently found insufficient to support contract modification.[27] In further support, Lockport argues that: (1) it reasonably relied on the Commission's rules and the

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26 See 16 U.S.C.A. § 824a-3(e) (West 1985 & Supp. 1994); 18 C.F.R. §§ 292.601 and 292.602 (1994).

27 If the Commission grants NYSEG's request, Lockport believes the Commission will be inundated with utility filings claiming that current avoided cost projections differ from their contractual rates, the QF industry will be plunged into uncertainty, and competition will be undermined.

agreement with NYSEG in developing its project; and (2) NYSEG's conclusions regarding the relationship between the contractual purchase rates and its current avoided costs are fundamentally flawed.

Saranac argues that its contract with NYSEG violates neither the provisions of PURPA nor the Commission's implementing regulations. Saranac states that, consistent with PURPA and the implementing regulations, its rates were calculated at the time the obligation was incurred and set below NYSEG's avoided costs as projected by the New York Commission. Saranac believes that NYSEG's current avoided cost estimates are fundamentally flawed.

Saranac also argues that NYSEG's request for a declaratory order comes fifteen years too late. If NYSEG disagreed with the clear provisions of the Commission's regulations implementing PURPA, it should have contested those regulations when they were promulgated according to Saranac. Saranac asserts that NYSEG's claim that only now does it have sufficient evidence to appeal the regulations is hollow because other similarly situated parties were able to pursue such appeals at the time the regulations were promulgated, and the regulations ultimately were upheld by the United States Supreme Court. Saranac contends that NYSEG cannot now belatedly pursue such an appeal.

Like Lockport, Saranac argues that the Commission has no jurisdiction to grant the Section 210 enforcement requested by NYSEG. Saranac believes that such enforcement is limited to a State's failure to implement the Commission's regulations, and no such complaint is made by NYSEG.

Finally, as indicated above, Saranac points out that any revision of the Commission's regulations, such as that being requested by NYSEG, requires a full notice and

comment rulemaking, and any regulations resulting from such a procedure could be applied only prospectively. Saranac contends that this is the only process that would comport with Commission precedent regarding pre-existing contracts and the industty's appropriate reliance on the Commission's regulations.

E. Other Interventions

1. State and Governmental Entities

On March 14, 1995, the New York Commission filed a notice of intervention in support of NYSEG's Petition. The New York Commission complains that, because avoided cost estimates for NYSEG and other New York utilities have dropped since 1990, the purchase prices contained in the Lockport and Saranac agreements are a burden on NYSEG's ratepayers and have contributed to economic depression in NYSEG's service territory. Therefore, the New York Commission encourages the Commission to modify the exemption of the Lockport and Saranac facilities from rate regulation and revise the purchase rates contained in their contracts pursuant to Section 206(a) of the FPA.[28] The New York Commission believes these actions are appropriate because, after fifteen years of PURPA implementation and the resulting changes in the electricity industry, cogeneration and small power production no longer require incentives for development. In addition, the New York Commission asks the Commission to consider prospective modification of Lockport's and Saranac's gas supply contracts and to authorize, as a general matter, curtailment of utility purchases from QFs where (a) contract

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28 Lockport and Saranac, as QFs that do not fall within the exclusion set forth in 18 C.F.R. § 292.601(b), are exempt from Section 206 of the FPA. See 18 C.F.R. § 292.601(c).

prices exceed the utility's actual avoided costs, (b) the utility can demonstrate that the purchases would impose an undue and substantial burden on utility ratepayers, and (c) curtailment would not defeat the QF's financial viability.

The New York State Consumer Protection Board (New York Board) also intervened in support of NYSEG's Petition on March 14, 1995. The New York Board, which is charged with the statutory duty of representing the interests of consumers of the state before federal, state and local administrative and regulatory agencies,supports NYSEG's Petition on the basis that PURPA prohibits payments to QFs in excess of a utility's incremental costs. The New York Board believes that the rates contained in the Lockport and Saranac agreements inflate rates paid by NYSEG's consumers and contribute to the unfavorable economic environment in upstate New York.[29]

On March 30, 1995, the Pennsylvania Public Utility Commission (Pennsylvania Commission) filed a motion for late intervention raising no substantive issues.

Finally, the Secretary of the Department of Energy (DOE) filed a notice of late intervention on April 6, 1995. DOE is concerned that NYSEG's requested relief will undermine the successful contribution of PURPA,

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29 Although it did not formally intervene, the Town of Lockport Industrial Development Agency (Agency) submitted a letter to the Commission on March 13, 1995, supporting the Lockport facility's continued operation and noting that General Motors Corporation (GM), a major employer and important community member, relies on the facility (through purchases of steam and electricity) for the continued viability of its manufacturing plant. The Agency also expresses an inability to understand how NYSEG now can challenge a contract which NYSEG describes as being executed under the Commission's regulations as implemented by the New York Commission.

demonstrated over the last fifteen years, to our national energy policy. DOE believes that the Commission's regulations authorizing QF payments on the basis of long-term projections of avoided costs reflect a reasonable construction of Section 210(b) of PURPA, which does not provide direction on how or when to determine incremental cost. Most importantly, DOE emphasizes that a competitive electricity market cannot flourish without greater reliance on the integrity of contracts.

2. Cogenerators and Independent Power Producers

On March 10, 1995, the Independent Power Producers of New York, Inc. (IPPNY) filed a motion to intervene and protest. IPPNY is a not-for-profit trade association that represents more than 100 owners, operators, suppliers and financiers of QFs selling power in, or to utilities located in, the State of New York. IPPNY argues that the Lockport and Saranac contracts, containing purchase rates that were approved by the New York Commission as below NYSEG's avoided costs, are fully consistent with PURPA's mandates. IPPNY further argues that NYSEG, if it thought it had too much exposure to overpayments, should have sought judicial review in State court of the New York Commission's approval of the contracts. Its failure to do so, according to IPPNY, shows the reasonableness of the New York Commission's determinations. Finally, IPPNY urges the Commission to retain its policy, reaffirmed in recent precedent, of refusing to interfere with long-standing contracts. To do otherwise, according to IPPNY, would lead to countless lawsuits and financial losses for other QFs throughout the country.

Also on March 10, 1995, the Electric Generation Association (EGA) filed a motion to intervene and to dismiss NYSEG's Petition. EGA, a national trade association representing independent power producers, including owners

of QFs, and suppliers of gcods and services to the wholesale electric generation industry, focuses its argument on the detrimental impact that Commission intrusion into the sanctity of contracts would cause. EGA asserts that unilateral reformation of executed power purchase agreements would undermine the competitive environment, grounded in greater market discipline, which the Commission is trying to create. Moreover, unless existing utility obligations to purchase independent power at negotiated rates are honored, EGA contends that independent producers will suffer irreparable financial hardship and the progression to a competitive power market will not continue. Finally, EGA points out that the risks associated with the use of LRAC estimates fall equally on utilities and QF sellers, and that retrospective Commission review and analysis of avoided cost estimates is inconsistent with PURPA and the Commission's regulations.

The National Independent Energy Producers (NIEP), an association of companies that supply electricity for sale to utilities, filed a motion to intervene, protest and answer on March 14, 1995. NIEP argues that the Commission should reject NYSEG's Petition for four reasons. First, evaluation or modification of fixed rates in existing QF contracts is precluded under Section 210(e) of PURPA, which exempts most QFs from utility-type rate,regulation under the FPA. Second, NYSEG's untimely efforts to modify the Lockport and Saranac purchase rates are barred by the doctrines of collateral estoppel and laches. Third, the Commission and the courts do not allow retrospective application of changes to Commission policy if such retrospective application disrupts the settled expectations of those that relied on existing regulations. Finally, granting NYSEG's requested relief would mean that only utilities could rely upon long-term contracts, and the electricity market would return to its pre-PURPA status where utilities were virtually the only generation suppliers.

On March 14, 1995, both the Independent Energy Producers Association, Inc. (IEP) and the Cogeneration Association of California (CAC) filed motions to intervene. IEP is a non-profit trade organization representing 42 owners and operators of nonutility generating facilities In California. CAC is an ad hoc association whose members are cogeneration companies with QF projects and long-term contracts. Both IEP and CAC oppose NYSEG's Petition as an impermissible intrusion into the sanctity of contracts relied upon by QFs to obtain financing for their projects. IEP argues further that (a) the regulatory promise of PURPA and the Commission's regulations is that rates for QF sales need not change over time even if the utility's current avoided costs do change, and (b) modification of the Lockport and Saranac agreements is beyond the Commission's jurisdiction and would amount to retroactive application of a change in the Commission's regulations. IEP also points out that NYSEG proposes to treat its own resources that exceed current market prices differently from QF facilities, arguing that under the regulatory compact it should recover all costs associated with its nuclear and coal facilities but that QFs have no right to rely on existing contracts or prior regulatory commitments. According to IEP, there are 3,600 power purchase arrangements entered into throughout the country in reliance on the Commission's PURPA regulations. Finally, IEP asserts that the utilities would be the direct beneficiaries of the defaults and bankruptcies of independent facilities that would result from granting NYSEG's request, and that the ultimate losers from the demise of competition would be ratepayers.

On or before March 13, 1995, three owners and operators of cogeneration facilities moved to intervene: Binghamton Cogeneration Limited Partnership (Binghamton), Fulton Cogeneration Associates (Fulton) and Watson Cogeneration Company (Watson). Binghamton and Fulton

raise no substantive issues. Watson believes that the NYSEG Petition should be dismissed because (a) the Lockport and Saranac agreements are fully compatible with PURPA, (b) the Petition is untimely in its attack on regulations adopted in 1980, (c) NYSEG, relying only on further projections of avoided cost, has failed to prove any injury, and (d) granting NYSEG's request would disrupt other existing contracts, injuring the cogeneration and independent power industries.

Motions to intervene out-of-time were filed by (a) California Energy Company, Inc. (California Energy) and Magma Power Company (Magma) on March 15, 1995, (b) Indeck Energy Services, Inc. (Indeck) on March 20, 1995, (c) Cogen Technologies, Inc. (Cogen) on March 24, 1995, and (d) Kamine/Besicorp Allegany L.P. (Kamine/Besicorp) on March 29, 1995. Kamine/Besicorp explains that it operates a QF from which electricity is sold to Rochester Gas and Electric Corporation (RG&E) pursuant to a long-term power purchase agreement executed in reliance on PURPA and the Commission's implementing regulations. Kamine/Besicorp supports the arguments made by Saranac and the National Power Lenders Forum (the Forum) in their motions to intervene.[30]

Cogen, through its affiliates, is an investor, developer and operator of a number of QFs, one of which sells power to Consolidated Edison Company of New York, Inc. (ConEd) pursuant to a long-term contract approved by the New York Commission. Cogen argues that NYSEG's Petition should be summarily denied for the same reasons asserted in interventions by other independent power producers. Indeck, through affiliates, owns QFs that sell

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30 The Forum's motion to intervene is described further below. See infra pp. 14-15.

electric energy and capacity under long-term power purchase agreements to NYSEG, ConEd and Niagara Mohawk Power Corporation (Niagara Mohawk). Indeck protests NYSEG's Petition, is concerned that ConEd and the New York Commission have sought to expand this proceeding to request broad-scope Commission interference in long-term. cortracts, and supports the arguments made by IPPNY.

California Energy and Magma own, operate and develop QFs and other independent power production facilities. They are concerned that NYSEG's Petition could adversely impact their QF contracts executed pursuant to PURPA and their ability to obtain financing for future development. California Energy and Magma make further arguments similar to those made by other independent producers about the Commission's jurisdiction in this proceeding and the Lockport and Saranac agreements' compliance with PURPA.

Finally, motions to intervene out-of-time were filed by Warbasse-Cogeneration Technologies Partners, L.P. (Warbasse) on April 7, 1995, and Brooklyn Navy Yard Cogeneration Partners, L.P. (BNYCP) on April 10, 1994, both of which note that the New York Commission's intervention raises generic issues that could affect all QF contracts. Warbasse owns and operates a QF from which it sells electricity to ConEd. BNYCP is developing a cogeneration project that will sell electricity to ConEd at rates based upon winning bids in ConEd's all-source bidding program.

3. Natural Gas Companies

On March 14, 199S, Aquila Energy Marketing Corporation (Aquila) filed a motion to intervene and protest. Aquila is a natural gas marketing company that supplies a portion of the natural gas requirements of the Lockport facility. Aquila argues that the NYSEG Petition should be dismissed because NYSEG failed properly to challenge the Commission's implementing rules and the New York Commission's avoided cost determinations and orders concerning the agreements. Aquila states that all the parties involved with the Lockport project, including the fuel suppliers, have relied upon the executed and approved Lockport power purchase agreement in entering into their own agreements, the obligations of which depend upcn the continued performance of NYSEG and Lockport under the Lockport agreement.

North American Resources Company (NARCO), another supplier of natural gas to the Lockport facility, filed a motion to intervene and protest on March 15, 1995. NARCO requests that the NYSEG Petition be dismissed as a collateral attack on the Commission's regulations and the final order of the New York Commission. NARCO insists that (a) as recognized in the NYSEG Petition, determining the basis for permissible rates in longterm contracts is fully within the Commission's discretion and (b) to the extent that balancing interests is appropriate in this proceeding, the Commission must consider all the relationships that were entered into in reliance on the Lockport agreement.

On March 14, 1995, TransCanada Pipelines Limited (TransCanada) filed a motion to intervene and protest opposing NYSEG's Petition. TransCanada, a provider of firm natural gas transportation services to Saranac and NYSEG, states that it made significant expansions to, and investments in, its infrastructure to service the non-utility

generating industry in New York in reliance on contracts such as that between Saranac and NYSEG. Moreover, TransCanada explains, the National Energy Board of Canada similarly relied on such contracts in approving the expansions.

The Canadian Association of Petroleum Producers (CAPP) also filed a motion to intervene and protest on March 14, 1995. CAPP is an industry trade association representing 194 Canadian oil and gas producers that supply fuel to existing and potential future cogeneration projects. CAPP asks the Commission to deny the relief requested by NYSEG because it would damage the economics of existing independent power projects and jeopardize the financeability and chill the development of future projects. Further, CAPP requests that the Commission establish (a) a hearing proceeding in the event that it considers relieving NYSEG of its contractual obligations and (b) a formal rulemaking proceeding in the event the Commission considers modifying its implementing regulations.

ProGas Limited (ProGas), a natural gas supplier to Lockport, filed a motion to intervene on March 14, 1995, raising no substantive issues.

4. Public Utilities

On or before March 14, 1995, Atlantic City Electric Company (Atlantic), Central Maine Power Corporation (Central Maine), ConEd, Long Island Lighting Company (LILCO), Niagara Mohawk and RG&E each filed separate motions to intervene in this proceeding. These utilities each state that they have contracts with QFs that exceed their avoided costs and, therefore, will be impacted in their ability to seek relief fiom these high-cost contracts by the outcome of this proceeding. Central Maine argues further that (a) the prospect of numerous claims similar to NYSEG's is not a

reasonable basis for the Commission to decline to act in this matter and (b) QFs' rights under contract law should not take precedence over other parties' interests. Niagara Mohawk asserts that (a) experience has proven erroneous the Commission's expectation that overestimations and underestimations of avoided cost will balance out in the long run, and (b) mandated QF agreements are inconsistent with a competitive wholesale electric market, particularly in states like New York where past regulatory policies have been flawed.

5. Other Organizations and Corporations

On March 14, 1995, the National Power Lenders Forum (the Forum) filed a motion to intervene and protest. The Forum is an informal association of major domestic and international financial institutions whose members have significant outstanding loans to, or other substantial investments in, electric generating facilities that sell power to utilities in New York and other states pursuant to long-term agreements.[31] The Forum explains that the loans it provides QFs are highly structured project financing arrangements that rely on a steady flow of revenues to projects under power sale contracts similar to those of Lockport and Saranac. It further explains that the policy of respecting sanctity of contracts allows contracts to be used to allocate risk, on an enforceable basis, among parties to a transaction. Any effort

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31 Financial institutions participating in the Forum are ABNAMRO Bank, N.V., CIGNA Investments, Inc., Credit Suisse, General Electric Capital Corp., John Hancock Mutual Life Insurance Co., Mellon Bank, N.A., National Westminster Bank Plc, The Prudential Insurance Company of America and Swiss Bank Corporation. Some members are lenders to the Lockport and Saranac projects. The members' aggregate loans to QFs exceed $11.5 billion.and Saranac projects. The members' aggregate loans to QFs exceed $11.5 billion.

by the Commission to revise this policy to allow invasion of existing contracts, the Forum argues, would (a) cause lenders and investors to lose confidence in their ability to assess investment risk on the basis of contracts within the Commission's reach, (b) undermine the essential support for the capital structure of the QF industry, (c) impair the ability of banks and institutional lenders to finance the electric services industry on reasonable and relatively low-cost terms, and (d) threaten the existence of future competition in the industry. The Forum also argues that purchase rates in executed and approved QF contracts are exempt from federal and state regulation, the prices in the Lockport and Saranac agreements are consistent with Section 210 of PURPA and the Commission's implementing regulations, and NYSEG's Petition requests impermissible retroactive rulemaking. Finally, the Forum contends that uncompensated reductions in the prices for electricity under the Lockport and Saranac agreements would constitute a taking in violation of the United States Constitution, and, if such reductions were instituted by the New York Commission, would violate the Contract Clause of the Constitution.

Also on March 14, 1995, GM filed a protest and motion to intervene. Through one of its divisions, GM operates a manufacturing plant in Lockport, New York, that consumes steam and electric energy produced by the Lockport facility. GM believes that the relief requested by NYSEG would endanger the economic viability of the Lockport facility and, therefore, its manufacturing plant which, due to energy savings afforded by the Lockport facility, has increased production and received relocated operations previously conducted outside the United States. GM points out that, in a more competitive electricity marketplace, all parties will rely less on traditional rate regulation and more on contractual arrangements. Similarly, industrial and commercial customers, who make critical resource decisions in reliance on contractual terms, will

require contractual certainty to compete effectively. GM argues that NYSEG's request to modify purchase rates in the Lockport agreement improperly challenges the lawful avoided cost determination of the New York Commission and, because Lockport is a QF exempt from utility-type rate regulation, is beyond the Commission's rate jurisdiction.

Finally, the American Forest and Paper Association (AFPA), an association of the forestry, pulp, paper, paperboard and wood products industry, filed a motion to intervene and protest on March 14, 1995. AFPA's members hold sizable manufacturing interests in New York, represent in the aggregate the third largest industrial purchaser of electricity from utilities in the United States, and engage in significant self-generation and cogeneration of electric power. AFPA opposes NYSEG's Petition as a collateral attack on the Commission's PURPA regulations and a threat to major investment commitments made by its members in reliance on these regulations and the availability of purchased steam from third-party generators. AFPA states that, if the Commission allows executed contracts to be disturbed, its members may lose both their generating plants and their paper plants.

F. Responses to Interventions

1. NYSEG

On March 22, 1995, NYSEG filed a reply to the pleadings that responded to NYSEG's Petition. NYSEG reiterates the legal arguments made in its Petition and rebuts the arguments of Lockport, Saranac and those intervening in their support as follows. First, NYSEG asserts that the Commission has statutory authority to grant the requested relief because Congress cannot have intended to leave the Commission powerless to remedy perceived violations of PURPA's avoided cost rate standard. Second, NYSEG

argues that the Lockport and Saranac contracts are not consensual agreements deserving of particular deference. Third, an order granting NYSEG's Petition will aid the competitive market, according to NYSEG, because it will stop the payment of subsidies to competitors. Finally, NYSEG asserts that its Petition presents no timing issues because it was filed at the time NYSEG became aware of the gap between its avoided costs and the contract rates, the Commission has never before addressed whether PURPA permits a permanent divergence from avoided cost, and NYSEG seeks only prospective modification of the mandated rates.

2. Lockport and Saranac

On March 24 1995, Lockport filed a response to the intervention of the New York Commission, taking issue with the position of the New York Commission in three ways. First, Lockport asserts that the curtailment of QF purchases requested by the New York Commission would violate this Commission's regulations generally and the amendment to the Lockport contract, voluntarily negotiated and executed by NYSEG in October 1994, waiving NYSEG's right to any further curtailment of the Lockport project, specifically. Second, Lockport argues that the Commission has no jurisdiction to decide whether to encourage cogeneration; Congress has mandated such encouragement through the provisions of PURPA. Finally, Lockport describes the New York Commission's substantial involvement in the negotiation and approval of the Lockport and Saranac contracts and expresses concern that the New York Commission's unwillingness to support its actions will impair the viability of the competitive power market in New York State.

Saranac also filed a response to the New York Commission's intervention on March 24, 1995. Saranac

points out that the New York Commission relies solely on (a) the difference between NYSEG's current LRAC projections and the Lockport and Saranac purchase rates and (b) the economic depression in NYSEG's service territory for its request that this Commission disavow its regulations, overturn the New York Commission's orders, unilaterally revise Saranac's power-purchase agreement and gas supply contract, and permit curtailment of QF purchases for economic reasons. Saranac believes it is important to remember that the New York Commission, as a condition of approving the Saranac power purchase agreement, required Saranac to enter into a fixed-price, long-term fuel supply agreement to protect ratepayers from higher fuel prices. Saranac further contends that, because 100 percent of NYSEG's own generation, 90 percent of NYSEG's power purchases, and 100 percent of investor-owned utility generation in New York State exceed the avoided cost of 2.71¢ per kWh currently asserted by NYSEG, the New York Commission should be addressing rates for New York utility generation over which it has jurisdiction.

3. New York Commission

The New York Commission filed reply comments on March 24, 1995, to address the potential economic impact on Lockport and Saranac of the requested relief. The New York Commission states that it (a) would not support price reductions that would drive independent producers into bankruptcy, (b) does not believe that reducing the Lockport and Saranac prices would defeat the financial viability of these projects, and (c) believes that the requested relief would not have a deleterious effect on the independent power industry.

4. Cogenerators and Independent Power Producers

On March 24 1995, IPPNY filed an answer opposing the arguments raised by the New York Commission. IPPNY objects to the New York Commission's apparent reversal of its long-standing policy supporting long-term, fixed-price contracts. IPPNY believes that the New York Commission has ignored a number of essential issues in adopting this new position: (a) the New,York Commission's own role in NYSEG's high rates, (b) the financial impact on the independent power industry which has invested $10 billion in New York State in reliance on the New York commission's policy, (c) the impact on the viability of QFs' steam hosts, (d) the New York Commission's unquestioning acceptance of NYSEG's estimates of "overpayments" when such estimates have been subject to dispute proceedings, (e) the necessity of pricing NYSEG's own resources based on its LRAC estimates, (f) the numerous factors which have harmed the economic climate not only in NYSEG's service territory, but in the entire State of New York, and (g) the absence of any legal basis for the New York Commission's requests.

Also on March 24, 1995, EGA and NIEP each filed a response to the New York Commission's intervention. EGA objects to the New York Commission's request for revision of this Commission's regulations to allow regulation of the Lockport and Saranac contract prices. EGA believes that such revision would (a) constitute an action of generic applicability that, without notice and comment rulemaking, violates Administrative Procedure Act requirements, (b) be inconsistent with PURPA's goal of encouraging QF development, (c) inadvisably overturn Commission policies regarding contract reliance, and (d) prevent contracting parties from allocating market risks between themselves. NIEP asks the Commission to reject the New York

Commission's requests for the same reasons described in NIEP's protest.

5. Other Parties

ProGas filed a response to the New York Commission's intervention on March 24, 1995. ProGas argues that its gas supply contract with Lockport: (a) is, by reference to NYSEG's Petition, not at issue in this proceeding, and (b) has been approved by the Department of Energy's Office of Fossil Energy and, therefore, is beyond the Commission's jurisdiction.

On March 24, 1995, the Forum answered the interventions of the New York Commission and the New York Board. The Forum believes that the New York Commission and the New York Board incorrectly fault QFs for economic difficulties in New York. The Forum explains that job losses since 1988 and unemployment for 1994 cannot be blamed on two individual generation projects that began operation in 1992 and 1994. Moreover, the Forum asserts that the positive economic impacts of the independent power industry are not being considered and will be harmed if the New York Commission's requests are granted. The Forum urges the Commission to deny the New York Commission's curtailment request because, constituting a rule of general applicability, it is inappropriately raised in this proceeding, and it is inconsistent with PURPA and Section 292.304(f) of the Commission's regulations.[32] Finally, the Forum asserts that the New York Commission's short-term focus on rates, in lieu of a longer-range and broader view of economic benefits to commerce and ratepayers, indicates that this Commission should not leave implementation of PURPA to the states.

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32 18 C.F.R. § 292.304(f) (1994).

Niagara Mohawk filed a reply to the interventions of NIEP and the Forum on March 24, 1995. Niagara Mohawk argues that, contrary to the Forum's claims, governmentally-mandated power purchase agreements lack mutual assent and, therefore, do not warrant the same Constitutional protections as contracts freely entered into. NIEP and the Forum are also wrong in asserting that the Commission has no jurisdiction over the Lockport and Saranac rates, according to Niagara Mohawk. Rather, Niagara Mohawk believes that Section 210(b) of PURPA requires the Commission to insure that QF rates meet statutory standards, and the Commission must address any violations of such standards that arise from changed circumstances.

Finally, on March 24, 199E, ConEd replied generally to the pleadings filed in this proceeding. ConEd believes that the Commission's recent decision in CGE Fulton, L.L.C.[33] stands for the proposition that a utility cannot be required, under a QF agreement, ultimately to pay a rate in excess of its avoided cost. ConEd thinks this conclusion should apply to NYSEG even though, unlike the situation in Fulton, the Lockport and Saranac rates were not facially invalid at the time the agreements were executed.

III. Discussion

A. Procedural Matters

Under Rule 214 of the Commission's Rules of Practice and Procedure, [34] the notices of intervention of DOE and the New York Commission and the timely,

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33 70 FERC ¶ 61,290 (1995) (Fulton).

34 18 C.F.R. § 385.214 (1994).

unopposed motions to intervene of Lockport, Saranac, the New York Board, IPPNY, EGA, NIEP, IEP, CAC, Binghamton, Fulton, Watson, Aquila, TransCanada, CAPP, ProGas, Atlantic, Central Maine, ConEd, LILCO, Niagara Mohawk, RG&E, the Forum, GM and AFPA serve to make them parties to this proceeding. In addition, we will grant the untimely motions to intervene of the Pennsylvania Commission, NARCO, Indeck, Cogen, Kamine/Besicorp, California Energy and Magma, Warbasse and BNYCP. We find that these interventions will not cause any undue prejudice or delay and that these parties have a sufficient interest in the outcome of this proceeding. Further, in light of the important issues raised, and in order to complete the arguments of all of the parties, we will consider (and thus not reject) all responsive pleadings filed in this proceeding.

B. NYSEG's Requests for Relief

We will deny NYSEG's requests for relief. The Commission's regulations implementing PURPA do not prohibit rates for purchases from QFs that (1) are based on estimates of a utility's avoided costs calculated at the time the obligation is incurred and (2) subsequently differ from the utility's actual avoided costs at the time of delivery. Moreover, as we indicated in two recent orders, and as we explain further below, we will not disturb existing QF contracts containing such purchase rates if the contracts were not challenged at the time they were signed and are not now the subject of an ongoing challenge to the State's avoided cost determination.[35] NYSEG has presented no legitimate reason for us to depart from the holdings of these orders in this regard-and to upset long-term contracts with Lockport and

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35 Southern California Edison Company and San Diego Gas & Electric Company, 70 FERC ¶ 61,215 at 61,678 (1995) (California); Connecticut, 70 FERC at 61,029.

Saranac which were the basis for the financing and construction of the QF projects and under which the parties have been providing and paying for service.

Because NYSEG focuses its arguments on the Commission's regulations implementing PURPA, we take this opportunity to explain the import of, and the underlying reasons for, these regulations. The regulations specifically allow rates for the purchase of QF energy or capacity pursuant to a contract over a specified term to be based on avoided costs calculated, at the option of the QF, at the time of delivery or at the time the obligation is incurred.[36] Furthermore, the regulations make clear that, if rates are based on avoided cost estimates at the time the obligation is incurred, the rates are consistent with PURPA's requirements even if they differ from avoided costs at the time of delivery:

> In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.[37]

At the time these regulations were promulgated, the commission anticipated that avoided costs could change over time and balanced the relevant competing interests. The

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36 18 C.F.R. § 292.304(d)(2) (1994); see supra p. 2.

37 18 C.F.R. § 292.304(b)(5) (1994).

Commission intended the regulations described above "to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for [QFs] to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs."[38] The Commission recognized that, if the avoided cost of energy at the time it is delivered is less than the price provided in the contract, a utility may be required to pay a rate for purchases that would subsidize the QF at the expense of the utility's other ratepayers. However, the Commission also was:

> cognizant that in other cases, the required rate will turn out to be lower than the avoided costs at the time of purchase. The Commission does not believe that the reference in the statute to incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between [QFs] and electric utilities.

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38 Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of [PURPA], Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 5, 1980), FERC Stats. & Regs., Regulations Preambles 1977-1981 ¶ 30,128 at 30,880 (1980), order on reh'g, FERC Stats. & Regs., Regulations Preambles 1977-1981 ¶ 30,160 (1980), aff'd in part and vacated in part, American Electric Power Service Corporation v. FERC, 675 F.2d 1226 (D.C. Cir. 1982), rev'd in part, American Paper Institute, Inc. v. American Electric Power Service Corporation, 461 U.S. 402 (1983).

> Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these latter arguments, and believes that, in the long run, "overestimations" and "underestimations" will balance out . . . . The import of this section [Section 292.304(b)(5) quoted above] is to ensure that a [QF] which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances. This provision can also work to preserve the bargain entered into by the electric utility.[39]

It is now far too late in the Commission's implementation of PURPA for NYSEG to argue, for the first time, that these particular regulations have legal and policy flaws requiring that we abrogate contracts entered into under these regulations.

In addition to being consistent with our regulations, the answer we give NYSEG herein is consistent with our practice of relying on the states to make factual determinations of utilities, avoided costs. As we recently stated in our

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39 Id.

California order, we have not been willing in the past, and do not intend in the future,

> to second-guess state regulatory authorities' actual determinations of avoided costs. . . . Rather, the Commission believes its role is limited to ensuring the process used to calculate the per unit charge (i.e., implementation) accords with [PURPA] and our regulations.[40]

As Lockport and Saranac correctly recognize, NYSEG raises no charge in this proceeding that the New York Commission failed to implement properly the Commission's PURPA regulations. In fact, NYSEG states to the contrary:

> In ordering NYSEG to accept the terms of the Lockport and Saranac agreements, the New York Commission was carrying out its statutory mandate under Section 210(f) of PURPA to implement the Commission's rules . . . grant[ing] the states broad authority to determine the

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40 California, 70 FERC at 61,677. See also, Connecticut, 70 FERC at 61,029; LG&E-Westmoreland Hopewell, 62 FERC ¶ 61,098 at 61,712 (1993); American REF-FUEL Company of Hempstead, 47 FERC ¶ 61,161 at 61,533 (1989).

specific parameters of QF power purchase agreements.[41]

Moreover, NYSEG explains how the New York Commission, at the time it mandated the Lockport and Saranac contracts, specifically addressed and accounted for the risk of harm which NYSEG now asserts. Instead of requiring protective mechanisms such as tracking and reconciliation provisions as it had in other cases, the New York Commission chose to account for any potential risk by applying a discount to the applicable LRAC estimates that formed the basis for purchase rates contained in the Lockport and Saranac agreements.[42]

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41 Petition at 37-38. In this regard, the instant proceeding is very much unlike the recent Connecticut and California proceedings, in which the applications directly challenged the States' implementation of the Commission's PURPA regulations. Here, unlike in Connecticut and California, the request for relief is based on a direct challenge to this Commission's implementation of PURPA specifically, the Commission's regulations (in 18 C.F.R. 292.304) that allow rates in QF contracts to be based on a utility's avoided costs as calculated at the time the purchase obligation is incurred, even if such rates ultimately differ from avoided costs at the time of delivery.

42 Petition at 12, 38-39. The Commission understands that these discounts were not insubstantial. In its order approving the Saranac agreement, the New York Commission noted that the fixed pricing schedule contained therein was similar to the recently-approved Lockport agreement and stated:

> While reconciliation mechanisms reduce ratepayer risk, and so permit approval of a contract upon a lesser discount than that needed to justify an unreconciled fixed-rate schedule, the 7.4% discount [from the New York Commission's 1988 LRACs applicable to NYSEG] . . . is sufficient to warrant approval of [the Saranac agreement] without reconciliation. This discount .

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This case is distinguishable from the recent Connecticut decision. In Connecticut, we found that the rates for purchases from the QF in that case, as a legal matter, may have exceeded avoided costs at the time the rates were imposed, a situation we determined would be in violation of Section 210(b) of PURPA.[43] Here, in contrast, the contracts at issue reflect State implementation consistent with PURPA and our regulations. Accordingly, we will not disturb them.

A second, independent basis for denying NYSEG's Petition is the Commission's policy against invalidating contracts for which a PURPA-based challenge was not raised timely and is not still pending. Our position with respect to executed, unchallenged QF contracts was recently articulated in both the Connecticut and California cases, and we see no reason to diverge from this position, as requested by NYSEG.

NYSEG's reliance on our decision in the recent Connecticut case as precedent for the requested relief is misplaced. We held in the Connecticut order that a State statute that mandates rates for sales by QFs that exceed

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> . . exceeds the discounts provided under most reconciled contracts.

Petition at 12-131 quoting the New York Commission, Case Nos. 90-E-0867, 90-E-0865 and 90-E-0860 - Order Approving Contracts Subject to Conditions, March 5, 1991.

43 Similarly, in the California proceeding, the Commission addressed State-imposed rates for QF purchases, which failed to account for all available sources of capacity, prior to execution of the QF contracts (and assumption of purchase obligations).

avoided costs is preempted by PURPA.[44] We were aware that, should the appropriate State forum determine that the statute in question did require rates above avoided cost as a matter of fact, our legal conclusion in that case might affect an existing QF contract. However, this result was appropriate in Connecticut "because [the utility in Connecticut] has been challenging this rate since at least 1987,"[45] when the Connecticut Department of Public Utility Control ordered the utility to buy power at the disputed rates.

Similar facts are not alleged here. At the time the Lockport and Saranac agreements were executed, the purchase rates, according to New York Commission calculations, were below NYSEG's avoided costs. NYSEG, believing it had "neither a cognizable injury nor a basis to complain further to the New York Commission or to the Commission," chose not to appeal the New York Commission's orders mandating the agreements.[46] In both California and Connecticut, we affirmed again our general unwillingness to disrupt existing contracts under these circumstances:

> We believe that the appropriate time in which to challenge a state-imposed rate for a QF purchase is up to the time the purchase contract is

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44 Connecticut, 70 FERC at 61,029 and 61,031.

45 Id. at 61,029.

46 Petition at 3-5, 17, 47.

signed, not years into a contract.[47]

In this case, Lockport and Saranac (and their investors) invested in these projects in the reasonable belief that, once the deadline for timely challenges had passed, their contracts with NYSEG were lawful and binding under PURPA. We note that utilities have been quick to defend, and properly so, their right to recover legitimate, prudent and verifiable "stranded costs," based on claims that such costs are the product of settled and reasonable investor expectation.[48] The same principle applies to the investors in QF projects.

Moreover, as approved by the New York Commission, the contracts at issue allocated risks to both the purchaser and the sellers. Like NYSEG, Lockport and Saranac bore risks that their agreements would become uneconomic over time. QFs bear development risks not experienced to the same extent by traditional utilities.[49] As

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47 California, 70 FERC at 61,678. See also, Connecticut, 70 FERC at 61,029.

48 See Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 70 FERC ¶ 61,357 (1995), slip op. at 154-55.

49 The Conference Report on PURPA explained as follows:

> [C]ogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guamnteed to be recoverable.

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a result, they must rely on their power purchase agreements to obtain project financing, and we have ecognized the importance of contractual reliance for this purpose.[50] If we were to grant the relief requested by NYSEG and allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered. Such result is not, in our opinion, consistent with Congress' directive that we encourage the development of QFs.

As wholesale markets become more competitive, respecting contracts becomes increasingly important. Industry participants (and their investors) will rely more heavily on contractual, instead of regulatory, protection.[51] If financing generation becomes more difficult or even impossible because contracts are not respected, wholesale

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> Joint Explanatory Statement of the Conference Committee, Conf. Rep. No. 1750, 95th Cong., 2d Sess. 89, 1979 U.S.C.C.A.N. 7797.

50 As the Commission explained in the preamble, to its regulations implementing PURPA:

> > [I]n order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.
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> FERC Stats. & Regs., Regulations Preambles 1977-1981 at 30,868.

51 At times, the Commission must modify contracts pursuant to its responsibilities under the FPA. Still, the Commission does not exercise this authority lightly and strives to uphold the public policy of respecting contracts.

competition will diminish. This result would be contrary to this Commission's goals and to the Congressional intent expressed in the Energy Policy Act of 1992.[52]

The Commission orders:

(A) The untimely motions to intervene of the Pennsylvania Commission, NARCO, Indeck, Cogen, Kamine/Besicorp, and California Energy and Magma are hereby granted.

(B) The relief requested in NYSEG's Petition is hereby denied as discussed in the body of this order.

By the Commission.

(SEAL)

Lois D. Cashell,
Secretary.

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52 Pub. L. No. 102-486, 106 Stat. 2776 (1992).